83-1915

CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

The Kohn Beverage Company

Petitioner

vs.

Teamsters Local No. 348

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

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Attorney for Petitioner

82 pp

QUESTIONS PRESENTED FOR REVIEW

I. Can a State enact legislation which allows the nullification of the "No Strike" Provision of a Collective Bargaining Agreement in direct contravention of Article I, Section 10 of the Constitution of the United States?

PARTIES:

Pursuant to Rule 34.1 (b), Rules of the Supreme Court, the parties to this action are listed below:

Petitioner, The Kohn Beverage Company
1065 Jenkins Blvd.
Akron, OH 44308
(216) 724-1233

Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 348
272 W. Market Street
Akron, OH 44303
(216) 434-3424

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

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TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Kohn Beverage Company, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on February 1, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is unreported at 44, and is printed in Appendix A hereto, infra, page 44. The judgment of the Ninth District Court of Appeals is printed in Appendix A hereto, infra, page 45. The Journal Entry of Judgment of the Summit County Court of Common Pleas is printed in Appendix A hereto, infra, page 51.

JURISDICTION

Petitioner respectfully invokes the jurisdiction of this Court under 28 USC 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10 of the Constitution of the United States.

STATEMENT OF THE CASE

On or about September 1, 1981, Raymond Byrd, Walter Brannon, and William Douglas participated in an illegal and unauthorized work stoppage at the Kohn Beverage Company in violation of the contractual "No Strike" clause set forth in the Collective Bargaining Agreement entered into between the respective parties of this suit. The aforenamed employees were subsequently discharged on September 2, 1981, along with the remaining wildcat strikers who refused to report to work at the company after being notified. Raymond Byrd was specifically advised by telegram on September 1, 1981, which he received, that if he did not return to work on September 2, 1981, at his regularly scheduled shift, he would be

terminated from his employment with the Kohn Beverage Company.

William Douglas was notified by telegram at his last known address on September 1, 1981, which he received and was aware of, that if he did not return to work on the following day, he would also be terminated. Mr. Douglas did not report for work on September 2, 1981, and was also discharged from his employment at the Kohn Beverage Company.

Walter Brannon, a long distance truck driver, was advised by correspondence on September 2, 1981, which he received at his home address, that he should report to work at his regularly scheduled time of 9:00 p.m. on September 2, 1981. He was also clearly advised that if he did not report, he would be terminated from his employment

at the Kohn Beverage Company. Mr. Brannon told W. Gary Diehl, Vice-President and General Manager of Kohn directly that he would not return to work until the strike was resolved between the various parties, and was subsequently discharged by telegram when he did not report to work.

Grievances were filed on behalf of Plaintiffs-Appellees, Byrd, Brannon, and Douglas. The procedure for handling such grievances arising between union employees and Kohn management is set out in Article VII of the Collective Bargaining Agreement entered into between Plaintiff and Defendant on June 1, 1980:

> "Step 1: If there is an employee (or employees) aggrieved, he shall first attempt to settle the grievance with his supervisor.

> Step 2: Failing to settle the grievance in accordance with Step 1, the grievant shall then immediately reduce such grievance to writing and submit it to his Supervisor within five (5) working days of the occurrence of the event out of which the grievance arises [or within five (5) working days of the time he first learned of the event] with a copy to the Union Steward, who, along with the aggrieved employee and supervisor, shall attempt to settle the grievance. . ."

In consideration for the above arbitration provision, Local Union 348 agreed to the "No Strike" clause of the Collective Bargaining Agreement at Article IX:

> "The Employer and the Union mutually agree that in consideration of the arbitration procedure herein there shall be no strikes or lockouts for the term of this agreement."

Defendants Byrd, Brannon and Douglas were involved and participated

in a strike in direct contravention of the above contractual clause. On February 4, 1982, March 10, 1982, and March 11, 1982, arbitrations were heard respectively and adverse awards issued against the Kohn Beverage Company. An appeal was taken to the Summit County Common Pleas Court on July 8, 1982. In his opinion of May 12, 1983, Judge Donald B. McFadden granted a Summary Judgment motion on behalf of the three (3) former employees, concluding that there were not grounds under Ohio Revised Code Section 2711.10 to vacate the improper and illegal arbitration awards in question.

The Ninth District Court of Appeals on October 5, 1983, affirmed the decision of the trial court, and the Supreme Court of Ohio declined to accept the case for review on February 1, 1984.

The Kohn Beverage Company now petitions the present Court to grant certiorari in this case as Ohio Revised Code Section 2711.10 and its application by the Courts of Ohio have unlawfully restricted Petitioner's right to contract under Article I, Section 10 of the Constitution of the United States.

REASONS FOR GRANTING THIS WRIT

I.

Section 2711.10 of the Ohio Revised Code, as interpreted and applied by the Courts of Ohio, directly conflicts with Article I, Section 10 of the Constitution of the United States and Petitioner Kohn Beverage Company has resultingly been denied the freedom to contract provided thereunder.

Section 2711.10 states specifically as follows:

"In any of the following cases, the Court of Common Pleas shall make an Order vacating the award upon the application of any party to the arbitration if:

(A) The award was procured by corruption, fraud, or undue means.

(B) There was evident partiality or corruption on the part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the

> hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual final, and definite award upon the subject matter submitted was not made."

The statute does not provide for the situation where an arbitrator's award goes completely against the specific language, intent and purpose of the Collective Bargaining Agreement, which is precisely what occurred in this case. That which was bargained for by Kohn Beverage, an assurance of no strikes in return for a delineated grievance procedure, was denied them by the afore-cited statute. The Ohio Courts involved with this case were

freely permitted to reinstate three (3) men who blatantly breeched the essence of the Collective Bargaining Agreement because 2711.10 allows such decisions.

Article I, Section 10 of the Constitution mandates that no state shall pass any law impairing the obligation of contracts. The legislature of Ohio has done just that by enacting 2711.10, without a specific clause requiring vacation of an arbitrator's award where the decision runs clearly contrary to the bargained for agreement.

There is absolutely no point in negotiating a Collective Bargaining Agreement in Ohio as workers can disregard no strike provisions at any time, make use of the grievance procedure contained in the agreement and

be reinstated by an arbitrator. The weight of authority is absolutely contrary to this position.

There is no question that an employer has the right to terminate employees who strike in violation of a "No Strike" clause in a contract, and such actions have been upheld by arbitrators, the National Labor Relations Board, and the Courts maintaining jurisdiction over matters of this nature continually and consistently. Under similar circumstances to those present here, arbitrators have consistently upheld discharges of individuals who engaged in illegal and unauthorized strikes. It has been held that an employer may discharge all or some of those who engage in an illegal strike. The fact that only thirty (30)

out of one hundred (100) were discharged was held not to constitute discrimination per se, since selective discipline is not in itself discriminatory. (See Masonite Corp., 54 LA 633 (Stouffer); Acme Boot, 52 LA 585 (Oppenheim); Phillips Industries, 45 LA 943 (Stouffer); and Randall Co., 47 LA 15 (Wisner). All of these cases hold that it is reasonable to conclude that all individuals who absent themselves from work during a strike have sanctioned the strike, in the absence of some affirmative notice by them to the company disavowing their intent to strike. In Chrysler Corp., 63 LA 677 (Alexander), it was held that all participants in an illegal strike may be discharged. In Phillip Morris, 66 LA 626, Arbitrator Beckman held that where

an illegal strike is concerned, the arbitrator's sole function is to determine if the individual participated in the strike. In Price Bros., 74 LA 748, the arbitrator in upholding the discharge of an individual involved in an unlawful strike held it is not necessary to show the extent of the individual's participation only that the company acted reasonably and in good faith. In that specific decision, it was stated that while discharge is a drastic penalty, wildcat strikes are drastic penalties against an employer. The entire purpose of a grievance procedure involving arbitration as well as "No Strike" clauses is to eliminate strikes, and all parties, the company, and the union, and the employees, are expeted to live up to such provisions

and employees who disregard the "No Strike" clause must expect severe punishment.

In sustaining the decision of the company to discharge various employees and further disregarding as a defense general statements of fear without substantiation, Arbitrator Vernon L. Stouffer in D.W.G. Cigar Corp., (Lima, Ohio) and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local 908, decided February 19, 1965, said:

> "If there was reasonable basis for the fear of violence and injury as a deterrant to returning to work, the employees expressing same should have advised their Union, the Sheriff, and/or other police authorities, together with the names of the individuals responsible thereof. General statements of fear without substantiation cannot be considered. It is and was the responsiblity of the grievants

and the Union to ferret out those members responsible for the threats, if any." (See 44 LA 342.)

Arbitrator Stouffer further indicated in his opinion:

"The Company cannot by itself enforce the contract. Likewise it cannot be expected to sit idly by while irresponsible conduct on the part of a few Union members continues. Severe discipline must be imposed upon those members passively permitting such conduct to continue. Only by the imposition of such penalties can the problem be solved. Rank and file members of the Union themselves must cooperate with the leaders of their Union and assist in eliminating the trouble-makers. Their passive acquiescence and the failure to return to work constitutes participation." (See 44 LA 342.)

It is unquestionably the law that an employer need not offer reinstatement to employees who strike in violation of their contract and further that an employer is justified in discharging employees who participate in strikes in

violation of contractual "No Strike" clauses when the Union advised its members that the strikes were illegal and they should return to work. (See 1939 U.S. Supreme Court Sands case, 4 LRRM 530: In Re: International Paper Co. and International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 5, FMCS Case No. 71A4063, decided by Arbitrator Matthew A. Kelly.)

Since an illegal strike is not merely a breach of contract but undermines the entire Collective Bargaining process, a violation calls for severe punishment; and while an employer may discharge all participants as here, it is not required to do so but may employ selective discipline as long as such actions are not discriminatory. In the instant cases, there is no

evidence that Mr. Byrd, Mr. Brannon, and/or Mr. Douglas were selected for discriminatory reasons. Phillips Industries, supra; Ford Motor Co., 64-1 ARB 8128 (Platt).

In a case much similar to the instant situation, Arbitrator Stout in Gruman Flexible, 72 LA 326, upheld the discharge of an individual who along with others struck contrary to the advice from the Union, holding it was not necessary to show that the individual was an active participant in the strike, that it was sufficient that he was at the plant gate with others. [See also Fruehauf Trailer, 64-2 ARB 8548 (Geissinger); Clinton Corn Processing Co., 71 LA 555 (Madden), upholding the disciplining of 178 individuals who remained away from work

during an illegal strike; Trane Co., 71-1 ARB 8089 (Turkus) upholding discharges of persons engaging in a wildcat strike in violation of a "No Strike" clause, citing the N.L.R.B. Ruling in Mead, Inc., 113 N.L.R.B. 1040 that persons engaging in an unlawful strike are not entitled to the protection of the act. In CECO Corp., 71-1 ARB 8347, the discharge of six individuals who appeared at the plant gate during an illegal strike was upheld despite their claim they merely were at the gate to see if anyone was going to work. In United Parcel, 47 LA 1100 (Schmertz) the discharge of individuals who merely remained away from work during an unlawful strike was upheld. See also Crane Carrier, 66-2 ARB 8545 holding mere presence at the plant gate

during an unlawful strike put the individuals in the same situation as others and justified their discharge; also Hooker Chemical Co., 36 LA 857 (Kates)].

In Avco Lycoming, 51 LA 1228 (Turkus) discharges were upheld where as here there had been a number of previous unlawful strikes. The Arbitrator held that the company could discharge those it sees fit as long as its actions were not capricious, holding persons failing to work during an unlawful strike risk termination when they participate in a strike in breach of contract, citing Hussman Refrigerator, 66-1 ARB 8199 (Elkouri), and Daybrook Ottawa Corp., 66-2 ARB 8487 (Carpenter).

In G.A.F. Corp., 52 LA 480 (Dugan) the disciplining of a person off sick

but who did not call in during an illegal strike was upheld on the basis that under the circumstances the company could reasonably conclude he had joined the strike when he failed to call in to notify the company he was still ill. In Mack Truck, 64-1 ARB 8422 (Wallen) the disciplining of four persons was upheld even though they engaged in no overt acts during a strike.

In a situation similar to the instant case where an individual stated he did not go in to work during an unlawful strike as he feared violence, his discharge was upheld since no evidence of specific threats was shown and the individual did not communicate with the employer. Phillips Industries, 66-1 ARB 8042 (Stouffer). See also Foreman Bros., 74-2 ARB 8584 (Daly)

where a discharge was upheld though the person claimed to be ill but did not contact the company during an illegal strike. Thus it can be seen that arbitrators in situations similar to the instant cases have regularly upheld discharges of person who were relatively inactive but failed to work during an illegal strike.

Furthermore, it has been held that minimum participation in a strike and a past good record do not justify a mitigation of the penalty of discharge in an illegal strike situation. International Paper Co., 57 LA 162 (Kelley).

In the instant cases, all who failed to report for work were treated alike and discharged. Furthermore, the Courts have consistently held that an

employer may discharge any and all participants in a strike and also that said unauthorized strikes are an unprotected activity. Scofield v. N.L.R.B., 394 U.S. 423. (See also Mastro Plastics, 29 L.C. 69 779).

In Local 342 U.A.W. v. T.R.W., 6 Cir. 1968, 58 L.C. 13003, the Court refused to enforce an arbitrator's award in which he reinstated certain individuals who struck in violation of a "No Strike" clause in a contract, holding that once it was established that the individuals participated in the strike, the arbitrator had no authority to change the penalty of discharge. (See also U.M.W. Dist. 50 v. Chris Craft Corp., 56 L.C. 12330, 384 F(2) 946 to the same effect.

In South Western Electric Power, 216 N.L.R.B. 522, the Board held the employer did not violate the act when it discharged six (6) employees on sick leave at the time an unauthorized strike began, but who did not report to the Company when they were due to return to work. The Board held these individuals could be treated as strikers in the absence of any indication that they did not support the strike. They had an affirmative duty to notify the company if they did not want to be considered strikers. By remaining silent and taking no steps to disavow the strike, they were considered to have ratified the strike. In Bechtel Corp., 200 N.L.R.B. 503, an excuse of illness as a reason for not working during an unauthorized strike was held unavailing

as it was not supported by evidence or communicated to the company.

The Board has consistently held that a failure to work during an unlawful strike constitutes a voluntary refusal to work and support of the strike and is therefore an unprotected activity, and the employer could discharge all participants. Fisher Foods, 245 N.L.R.B. No. 87; National Tea, 198 N.L.R.B.,; and Marathon Electric Mfg. Co., 106 N.L.R.B. 1171.

There is absolutely no questiion that the evidence which was offered in the arbitrations conclusively established that Mr. Byrd, Mr. Brannon, and/or Mr. Douglas never disavowed the strike, never notified the company that they were following the instructions of their counsel while participating with

the strikers on the line, or give any other explanation for their participation in the strike, and did not in any fashion or degree ask the Union to notify the company that they were not participating with the strikers on the line in question. To the contrary, they particularly engaged themselves with the illegal strikers by parking their vehicles in such a fashion as to block the company's entrance and/or also engage actively with the other strikers on the line as the testimony of W. Gary Diehl, Rose Marie Diehl, and Sam Granada, clearly and concisely showed and demonstrated at the time of the hearings in question.

Accordingly, the company had the absolute right to discharge those striking employees who knew full well

that the strike was illegal, and also that they were not to participate in the subject strike, which by so doing, violated the terms and conditions of the "No Strike" clause of the contract in question. They engaged in what has been referred to by the National Labor Relations Board on numerous occasions as, "Non-Protected Activity".

In addition, in District 50, United Mine Workers of America v. Chris Craft Corp., 38 Fed. Reporter 2 d 946, 12/7/67, the United States Sixth Circuit Court of Appeals affirmed the decision of District Court Judge Celebrezze and held that a union was not entitled to compel arbitration of discharges of employees who admitted that they participated in an unauthorized work stoppage, that they realized at the

time of the work stoppage that it was contrary to the Collective Bargaining Contract and in violation of the "No Strike" clause. In that specific case, the Collective Bargaining Agreement provided as in the case at bar:

> "In the event that a dispute shall arise between the company and the union or any employee of the company who is covered by this agreement relative to working conditions, lay-off or discharge, the following grievance procedure will be used:

The agreement specifically at Section 5.8 of the Article in question provided that:

> "The Union, its officers, agents and members covered by this Agreement agree that so long as this Agreement is in effect, there shall be no strikes, sit-downs, boycotts or any unlawful acts that interfere with the Company's operations or the production or sale of it products."

The Court held specifically:

> "By their own admission the employees whose grievances are in dispute engaged in an unauthorized work stoppage. The District Court found that this violation of the "No Strike" clause was at least one reason for their discharges. Therefore, we find that the District Court properly held that the appellants were not entitled to compel arbitration of these discharges." (See 385 F. 2d 946 (1967) at page 949.)

In addition, the Court after further construing the action of Judge Celebrezze in his opinion said:

> "In order to perform its functions in applying the provisions of the Contract, the Court must determine that a discharge occurred. After such a determination, the Court must then inquire as to the cause of the discharge and determine from the agreement if the discharge is a matter for arbitration. Such a determination necessarily entails some limited inquiry into the factual circumstances surrounding the discharge. The Court made the proper inquiry and found that the discharges were not a matter for arbitration. We agree with that

finding." (Supra at p. 950.)

In Local 342 of the United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.) AFL-CIO v. T.R.W., Inc., 402 F. 2d 727 (1968) the United States Sixth Circuit Court of Appeals on October 23, 1968, reversed a decision of Circuit Judge O'Sullivan ordering that certain decisions of an arbitrator reinstating illegal striking employees to their employment with the company be reversed. In that case, employees of T.R.W., Inc. had been discharged for striking in violation of a Collective Bargaining Agreement on or about July 8, 1964. At that time more than two hundred (200) of T.R.W., Inc., employees walked off their jobs including a number of individuals who were involved in the subject

litigation. The next day before any of the strikers had returned to work, the company sent a telegram to each of the subject employees in question which read:

> "Because of your participation in an action in violation of Section 1, Article 10, of the company-union agreement dated February 15, 1963, you are discharged."

Grievances were subsequently filed and the matter of the discharges were arbitrated and an arbitrator's award entered on May 15, 1965, directed the reinstatement of all of the individuals who were discharged and ordered that two (2) of them be compensated for loss of pay from the date of their discharge. It was disclosed during the course of the grievance procedure before the arbitrator that the reason the subject appellees were selected for discharge

was because they had been the active ringleaders encouraging the employees to participate in the strike. In reversing the decision of the District Judge, the Sixth Circuit Court of Appeals said as follows:

> "We consider that the company's contract with the union of which all of the individuals were members gave it a clear right to do what it did. The language of this contract was not ambiguous, nor did any of the terms require interpretation by the arbitrator or the Courts. Neither before the arbitrator nor the District Judge, nor in their addresses to this Court did the appellees contend that the appellant company did anything that was not its clear right under the contract. Appellees did not dispute the fact that:
>
> a) There was a strike - a curtailment and restricting of production - an interference with work.
>
> b) The seven dischargees were members of the union.
>
> c) The discharges all took part in the involved conduct which

violated the contract.

Under these circumstances the company had the right:

a) To take disciplinary action - including discharge - against any employee who participated in the described contract, and

b) Such action could only be taken against all or against only selected participants.

Nothing in the contract made the exercise of these rights subject to ultimate approval of an arbitrator or a Court; neither was there a requirement or any preliminaries - prior notice or bilateral investigation." [See 402 F. 2d 727 (1968) at pps. 729-730.]

The Court further said in reviewing the decision of the District Judge:

"In ordering enforcement of the award, the District Judge said:

'The arbitrator found that while the company did have this explicit power of selective discipline an inquiry into the reasonable use of this power was not precluded. The Court is of the opinion that the arbitrator's ruling that the exercise of the power of selective discharge must be reasonable under

the circumstances is a fair and logical inference from the agreement.

Also, it is a reasonable inference that in the exercise of this power fair procedure must be adhered to.'

The conduct of the arbitrator, thus approved the District Judge, in reality constituted the addition of terms to a negotiated contract that was neither unclear nor incomplete. The arbitrator held that the company's way of exercising its contractual rights was lacking in fundamental fairness. He finds this fundamental unfairness in what he says was the company's failure to tell the employees why they were discharged. He said:

'The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to discharge an employee without informing him of the charges against him and without affording some opportunity for objective investigation.' (Supra at p. 730).

In further dealing with this situation,

the Court said:

> "There is nothing in the contract calling for objective investigation; neither does the arbitrator's opinion tell when and how in the crisis of an illegal walkout, an objective investigation was to be had. The contract provides:
>
> 'The arbitrator shall not have the power to add to or subtract from or modify any of the terms of this agreement or any agreement supplemental hereto.'
>
> It appears to us that the company's right to selectively discharge participants in an illegal work stoppage was intended to allow the company to deal quickly with such an emergency. The efficacy of its exercise is portrayed by the following factual findings of the arbitrator:
>
> 'On July 8, 1964, there was a work stoppage at the Company's Plant. Two hundred fifteen employees in the bargaining unit clocked out and left the plant at approximately 10:00 a.m. on that date. On the same date a substantial number of employees who were scheduled to work on the second shift did

not do so. On the following day (July 9, 1964) there were some two hundred thirty-six employees who were scheduled to work on the first shift who did not report at the scheduled starting time of 7:00 a.m. Employees on this shift did begin returning to work at approximately 11:30 a.m. on July 9. At 10:15 a.m. on July 9, the Company, through its Industrial Relations Manager, sent to each of the grievants involved in this case the following notice of discharge by wire.'

Thus, hardly more than an hour after the grievants were discharged, and the union notified of such fact, the employees began to return to work. It can be assumed that the contract provision which allowed the selective discharge of some of the participants in a walkout was the product of bargaining and that the company gave some quid pro quo to get it. An arbitrator should not be permitted to nullify it." (Supra at pp. 730-731).

In further describing and explaining the reasons for its opinion, the Court said:

"We see no reason to further

indulge in disseration or review of the cases which have dealt with the subject now under consideration. The trilogy, United Steelworkers v. American Mfg. Co., 363, U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1969); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960) have set down the applicable rules. Enterprise announces the rule controlling this case.

'Nevertheless, an arbitrator is confined to interpretation and application of the collective agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' 363 U.S. at 597, 80 S. Ct. at 1361. (See 402 F. 2d 727 (1968) at pp. 730-731.)

In Amanda Bent Bolt Co. v. International U. U.A.A., A.I.W., 451 F.

2d 1277 (6th Cir. 1971), an arbitrator determined:

> ". . .that employees striking in violation of a no strike provision in the collective bargaining agreement should be reinstated with back pay. The Court held that as said award was directly contrary to express language of the contract allowing the company to discharge striking employees, the arbitrator had exceeded his authority under the contract. [See also Atkinson v. Sinclair Refining Company, 82 S.Ct. 1318 (1962).]

In the cases at bar, it is very clear that the arbitrators in each instance have substantially gone far beyond the authority which they are provided in the Agreement. Article VIII, Section 2, entitled "Grievance and Arbitration" specifically provides that:

> "The arbitrator shall not be empowered to rule contrary to, to amend, or

to add to, or to eliminate any of the provisions of this Agreement and the practices which the parties may have developed under this Agreement." (See Collective Bargaining Agreement attached as Exhibit "A" to the Complaint, pp. 3-4.)

Article IX, entitled "No Strike Clause" specifically provides that:

"The Employer and the Union mutually agree that in consideration of the arbitration orocedure herein there shall be no strikes or lockouts for the term of this Agreement." (Supra at p. 4

Article XXIII, entitled "Union Liability" specifically provides:

"It is further agreed that in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members. It is further agreed that the Union shall undertake every reasonable

> means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above. The Employer in such unauthorized action shall retain its right to engage in such disciplinary action with reference to such unauthorized acts as is reasonable under all circumstances." (See Agreement at p. 14.)

It is clear that the decisions of the arbitrators involved were improper and contrary to the Collective Bargaining Agreement.

It is further apparent that the Courts of Ohio, applying the law of Section 2711.10, Ohio Revised Code, have denied Petitioner Kohn Beverage Company, the right to enter into and enforce the terms of a contract contrary to Article I, Section 10 of the Constitution of the United States. Petitioner respectfully concludes that this is a great issue of

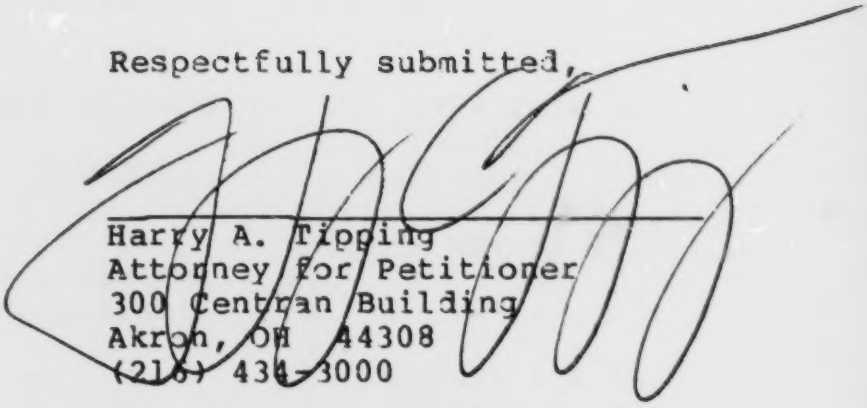
national importance and the petition for certiorari should therefore be granted.

CONCLUSION

Section 2711.10 of the Ohio Revised Code permits the denial of freedom to contract guaranteed under Article I, Section 10 of the Constitution of the United States. The Supreme Court of Ohio has sanctioned the said denial by its refusal to vacate the arbitration awards of Respondents Byrd, Brannon and Douglas who knowingly and willingly breached their obligations under the Collective Bargaining Agreement and yet were unlawfully reinstated to their positions.

The Petitioner respectfully prays that the petition for certiorari should be granted to correct this manifest injustice.

Respectfully submitted,



Harry A. Tipping
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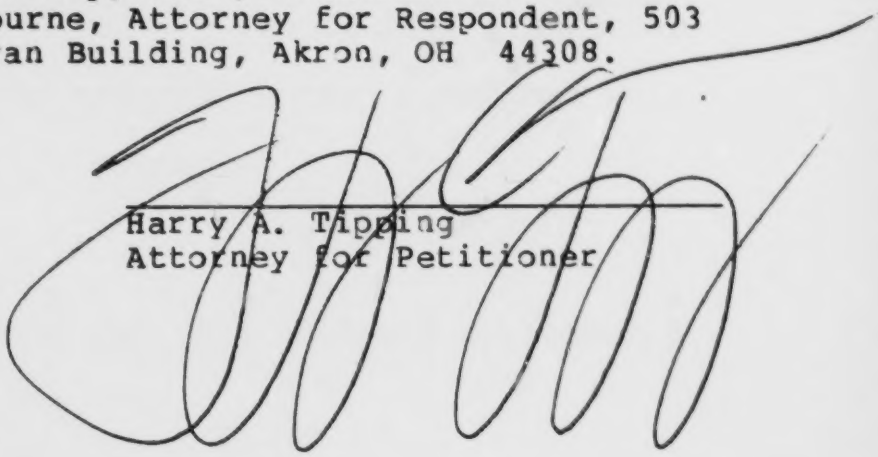
(216) 434-3000

CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. Mail service this 1st day of May, 1984, to Robert B. Laybourne, Attorney for Respondent, 503 Centran Building, Akron, OH 44308.



Harry A. Tipping
Attorney for Petitioner

THE SUPREME COURT OF OHIO

THE STATE OF OHIO	)	1984 Term
	)	To-wit:
City of Columbus	)	February 1, 1984

Case No. 83-1815

Kohn Beverage Co., Appellant	)	
	)	
vs.	)	MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
Teamsters Local No. 348 Appellee	)	

For Butler County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

Costs:

Motion Fee, $20.00, paid by Robert B. Laybourne.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal

of the Court this _____ day

of _____, 19___.

_____Clerk

_____Deputy

STATE OF OHIO)
) SS:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

C.A. No. 11175

KOHN BEVERAGE COMPANY)

Plaintiff-Appellant)

v.)

TEAMSTERS LOCAL #348)

Defendant-Appellee)

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, COUNTY OF SUMMIT, OHIO

CASE NOS. CV 82 6 1719
CV 82 7 2039
CV 82 5 1346

DECISION AND JOURNAL ENTRY

Dated: October 5, 1983

This cause was heard September 20, 1983, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argument by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, J.

This appeal is from the granting of a summary judgment in favor of three grievants in their consolidated cases arising out of aribtration awards reinstating the grievant employees who had been discharged by the company for participation in an illegal strike. We affirm.

The contract between the Union and Company provides for binding arbitrations and has a no-strike clause. Section 2, Article VIII provides:

> "****In case of a discharge or disciplinary layoff grievance, the arbitrator shall have the power to return the grievant to his employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts.***."

Article XXIII provides:

> "****It is further agreed that the Union shall undertake every

reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above. The Employer in such unauthorized action shall retain its rights to engage in such disciplinary action with reference to such unauthorized acts as is reasonable under all circumstances."

ASSIGNMENT OF ERROR 1

"The trial court erred in its decision to confirm the awards of the arbitrators because the same arbitrators lacked the requisite authority to return to employment individual striking employees who were found to have participated in the subject illegal wildcat strike and who were notified that if they did not return would be terminated from their employment at the Kohn Beverage Company. Such decision is contrary to law, the appropriate Ohio statutes and against the the manifest weight of the evidence."

The company argue that the sole authority of the arbitrator under the contract was to determine if there was an illegal work stoppage, and if the employees in question participated in it

by not returning to work, and subsequently were discharged for just cause after proper notice. It contends the arbitrator could only reinstate an employee who was unaware of the strike, was not involved in or properly notified the company of his intention not to participate.

The Union maintains that the arbitrator must pass upon the reasonableness of the disciplinary action under all the circumstances. He may reinstate the grievant and equitably mitigate the penalty imposed by the company. We agree.

While we must concede that the ultimate effect of the last phrase in Article XXIII is to dilute the right to discipline, no other interpretation can reasonably be made of it. It is clearly what was bargained for by the company.

The company has cited numerous authorities on the right to discharge for illegal work stopoages. Particularly it relies upon Amanda Bent Bolt Co. v. International Union U.A.A.I.W. Local 1549 (C.A. 6, 1971), 451 F. 2d 1277; District 50 U.M.W. v. Christ Craft Corp. (C.A. 6, 1967), 325 F. 26 946; 402 F. 2d 727. Each of those cases contains a different provision as to the right of discharge but none place a liberal limitation of reasonableness upon the company. The Chris Craft Corp. case specifically involved a prohibition clause against arbitration of illegal work stoppage discharges.

ASSIGNMENT OF ERROR 2

> "The trial court erred in its decision confirming the award of arbitrator Dallas Young as said arbitrator retained jurisdiction to compute back pay for grievant Raymond T. Byrd and according to law at the time of the signing of

an arbitration award, the arbitrator loses all jurisdiction over the subject matter."

We concur with the trial court's finding that the arbitrator's retention of jurisdiction to determine the amount of back pay if the parties could not agree was proper. It does not amount to a modification or resubmission of the issues. The trial court properly followed the reasoning of the court in Belo Corp. v. Typographical Union (N.D. Tex., 1972), 82 L.R.R.M. 2574.

ASSIGNMENT OF ERROR 3

"The trial court erred in its confirmation of the Douglas arbitration award by not permitting the Kohn Beverage Company to submit newly discovered evidence which clearly and conspicuously demonstrated beyond a reasonable doubt that the evidence submitted to the arbitrator for decision by the grievant was incorrect, improper, absoutely untrue, and would have provided for a different award."

The trial court properly found the Morrison affidavit to be newly discovered evidence and thus excludable. Shives v. Kramer-Elyria Co. (June 6, 1956), Lorain App. No. 1356, unreported. While perjured testimony could conceivably be reviewable under R.C. 2711.10(A), such is not the case before us. Morrison's affidavit only contradicts Douglas on the question of notice. The arbitrator clearly found not only notice of the strike, but participation. Thus the alleged perjury had no bearing on the outcome of the award.

ASSIGNMENT OF ERROR 4

> "The trial court misapplied the case of Williams v. Firestone Tire and Rubber Company, No. 2492 (Ninth District Court of Appeals, 1979) to the circumstances of the within action."

The company's brief here rehashes

the non-arbitrability of its reasonableness in exercising the right of discharge. It is purely argumentative and we have responded to it under the first assignment of error.

ASSIGNMENT OF ERROR 5

> "The trial court erred in holding that plaintiff accepted defendant's objections to the requests for admissions by not responding thereof, as plaintiff never received a copy of said objections."

We adopt the trial court's reasoning. The burden was on the company under Civ. R. 36(A) to pursue its requests and seek proper court orders if the answers were not received or were unsatisfactory.

SUMMARY

We overrule all five assignments of error and affirm the judgment of the trial court.

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The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Couty of Summit County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

s/ Daniel B. Quillin
Presiding Judge
- for the Court -

QUILLIN, P.J.
BAIRD, J.
CONCUR

APPEARANCES:

HARRY A. TIPPING, Attorney at Law, 300 Centran Bldg., Akron, OH 44308 for Plaintiff.

ROBERT B. LAYBOURNE, Attorney at Law 503 Centran Bldg., Akron, OH 44308 for Defendant.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

KOHN BEVERAGE COMPANY	)	Case Nos.
	)	CV 82 5 1346
Plaintiff	)	82 6 1719
	)	82 7 2039
-vs-	)	
	)	JUDGE McFADDEN
TEAMSTERS LOCAL #348	)	
	)	FINDING
Defendant	)	
		March 22, 1983

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This matter comes before the Court pursuant to Motions for Summary Judgment filed by both parties.

After reviewing the briefs, affidavits and pleadings in the case, the Court finds no material issues of fact in controversy and grants Defendant's Motion for Summary Judgment.

Plaintiff filed a Complaint to Vacate Arbitration Award. The employee involved was discharged after engaging in a wildcat strike. Grievances were filed and the decision of the arbitrator

ordered reinstatement of the employee without loss of seniority.

The bargaining agreement in effect between the parties contains a no strike clause and provides that in the event of a wildcat strike the employer has the right to "engage in such disciplinary action with reference to such unauthorized act as is reasonable under all circumstances." The contract also contains a grievance procedure which has arbitration as its final step and provides that the "decision of such arbitrator shall be final and binding upon the Company, the Union and its members and employees involved." The contract further provides that in the case of a discharge or disciplinary layoff grievance, the arbitrator has the power "to return the grievant to his

employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts."

The Plaintiff's complaint alleges that the arbitrator exceeded his power or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made and therefore the decision must be vacated un R. C. § 2711.10(D). Plaintiff has not shown, however, that the arbitrator exceeded his powers. The contract explicitly gives him the power to mitigate a pnealty or reinstate a discharged employee. There is nothing in the contract to indicate that such provision does not apply where the discharge results from participation in an illegal strike. In the absence of a

specific exception, the Court finds that the power given to the arbitrator applies in all discharge cases and the arbitrator had the authority to render a decision in this matter.

In order to vacate the decision of an arbitrator the Court must be able to state that the decision was totally irrational, that an opposite result is expressly mandated by the contract or was one that no judge could have made. Williams v. Firestone Tire and Rubber Co., No. 2489 (Ninth District Court of Appeals, 1979). Plaintiff has cited numerous arbitration awards upholding discharges arising out of illegal strikes and also a case refusing to uphold an arbitrator's award reinstating employees discharged for such activity. These authorities are inapposite because

the contract langauge was different from the instant case and because the situation of the employees involved was also different.

The contract in the case at bar provides that the discipline of the employer shall be reasonable. In his determination of whether to reinstate an employee, an arbitrator must have the authority to determine whether the discipline was, in fact, reasonable. The arbitrator had all of the facts before him and the Court cannot substitute its judgment for that of the arbitrator. The Court also notes that the same decision was reached by three different arbitrators involving the instant contract and employees involved in the same wildcat strike. Therefore, the Court does not find that the

conditions of Williams v. Firestone Tire and Rubber Co., supra, have been met and the decision of the arbitrator must be confirmed.

Counsel shall submit an appropriate entry.

JUDGE DONALD B. McFADDEN

cc: Attorney Harry A. Tipping
Attorney Robert B. Laybourne

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

		Case Nos.
THE KOHN BEVERAGE COMPANY	)	CV 82 5 1346 82 6 1719 82 7 2039
Plaintiff	)	JUDGE McFADDEN
-vs-	)	SUPPLEMENTAL FINDING
TEAMSTERS LOCAL 348	)	
Defendant	)	April 12, 1983

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Upon the Motion for Reconsideration filed by plaintiff on March 24, 1983, the Court issues this Supplemental Finding.

After due consideration, the Court finds that the retention of jurisdiction by the arbitrator in Case No. 82 5 1346 was proper. The cases cited by Plaintiff are inapposite for the reason that they concern attempts to resubmit an award or issues to the arbitrator. An arbitrator may properly retain

APPENDIX "D"

jurisdiction as a part of his award to determine the amount of back pay to be awarded as damages. See e.g. A. H. Belo Corp. v. Dallas Typographical Union, 82 L.R.R.M. 2574 (D.C. Tex 1972).

The Court further finds that the affidvit of James Morrison constitutes newly discovered evidence because it was obtained after the arbitrator had rendered a final award. Therefore, Plaintiff is not entitled to have the arbitration award in Case No. 82 6 1719 vacated. See Shives v. Kramer-Elyria Co. (Ninth Judicial District, No. 1356, (1956) and Newspaper Guild Local 35 v. Washington Post Co., 76 L.R.R.M. 22742 (1971).

The Court further finds that although Plaintiff's counsel alleges he did not receive a copy of Defendant's

objections to Plaintiff's requests for admission, such objections contain a certificate of service signed by counsel for Defendant. Therefore, because Plaintiff did not take steps to obtain satisfactory responses, it must be held that Plaintiff accepted such objection. See Rule 36(A), O.R.C.P., and Staff Notes.

Accordingly, Plaintiff's Motion for Reconsideration is not well taken and therefore must be denied.

JUDGE DONALD B. McFADDEN

cc: Attorney Harry A. Tipping
Attorney Robert B. Laybourne

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

KOHN BEVERAGE COMPANY	)	Case Nos. CV 82 7 2039
Plaintiff	)	82 6 1719
		82 5 1346
-vs-	)	JUDGE McFADDEN
TEAMSTERS LOCAL 348	)	FINDING AND ORDER
Defendant	)	
		June 28, 1983

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This matter is again before the Court because of Defendant's allegations of contempt by individuals who are a part of Plaintiff's management and also because of the Plaintiff's Motion for a Stay of Execution pending the processing of its appeal of the Court's prior rendition of judgment in favor of Defendant. The contempt allegations stem from Plaintiff's failure to re-hire the fired employees upon receipt of the Court's order.

The Plaintiff promptly commenced appeal procedures upon receipt of the Court's judgment adverse to it. There is consistent with its counsel's prior expression to the Court that it intended to appeal of unsuccessful in this Court.

The Court finds that justice and the orderly progression of this dispute to its conclusion calls for a stay of execution to the end that the appeal be not mooted. It is further found that the contempt allegations are meritless because they rest on Plaintiff's action in furtherance of its right of appeal.

The Court hereby dismissed the citations for alleged contempt and stays the execution of its judgment until further order of a court having jursidiction.

Dues to the nature of these proceedings, bond is neither necessary nor appropriate.

It is so ordered.

JUDGE DONALD B. McFADDEN

cc: Attorney Harry A. Tipping
Attorney Robert B. Laybourne

§ 2711.10 Court may vacate award.

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party in the arbitration if:

(A) The award was procured by corruption, fraud, or undue means.

(B) There was evident partiality or corruption on part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators.

HISTORY: GC § 12149-10; 114 v 137, § 10; 132 v S 33 (Eff 9-12-67); 133 v H 1. Eff. 3-18-69.

See former GC § 12158.

Comment

This section provides a method for vacating the award. It specifies in great detail the causes for which vacation may be had and is much more specific than was the former law. The specified causes for vacating an award are, without exception, concerned with misconduct on the part of the arbitrators or conduct of the arbitration. The arbitrators are the sole judges of the law and of the evidence and no vacation of an award will be had becuse of their misconstruction of the facts or the law. See Springfield v. Walker, 42 OS 543. It should be noted, however, that where the arbitrators exclude material and pertinent evidence the award may be vacated. See also Itoh v. Boyer Oil Co., 198 App Div 881, 191 NYS 290; Berizzi v. Krausz, 239 NY 315, 146 NE 436, for a further discussion of the meaning of this section.

Vacating an award may save the proceedings from a complete nullification when the judges recommit the award to the arbitrators, if the time within which the agreement requires the award to be made has not expired. See Whitehair v. Kansas Flour Mills Corp., 127 Kan 877, 257 Pac 190. The provisions for a rehearing are entirely new. Under the former law (GC § 12158) when the court vacated an award that decision, of necessity, vitiated the entire proceeding.

Cross-References to Related Sections

See RC § 2711.09 which refers to this section.

Comparative Legislation
Court may modify or vacate award. 9 USC §§1-13.

Court may modify or vacate award:
CA - Code of Civic Pro §§ 1286.2, 1286.6
FL - Stat Ann §§ 682.10-682.14
IL - Ann Stat ch 10 §§ 113.118

ARTICLE VIII: GRIEVANCE-ARBITRATION

Section 1: Having a desire to create and maintain labor relations harmony between them, the parties hereto agree that they will promptly attempt to adjust all complaints, disputes, and controversies in the following manner:

STEP 1: If there is an employee (or employees) aggrieved, he shall first atempt to settle the grievance with his Suprevisor.

STEP 2: Failing to settle the grievance in accordance with STEP 1, the grievant shall then immediately reduce such grievance to writing and submit it to his Supervisor within five (5) working days of the occurrence of the event out of which the grievance arises (or within five (5) working days of the time he first learned of the event) with a copy to the Union Steward, who, along with the aggrieved employee and supervisor, shall attempt to settle the grievance. If the Employer fails to answer any grievance within five (5) working days, the Employer forfeits the grievance to the employee.

STEP 3: If the grievance is not settled within three (3) working days after submission to the Steward and Supervisor, as set forth in STEP 2, the Steward shall promptly report the matter to the Union, which will attempt to settle the matter with the Employer.

If the grievance cannot be settled as outlined in STEP 3 within five (5)

working days after the first meeting of top Management and the Business Representative of the Union, the grievance may be submitted to arbitration as hereinbelow set forth.

In the event there is a Union grievance, as such, or an Employer grievance, as such, and in the event either party signatory hereto wishes to avail itself of the grievance procedure herein, it shall initiate its action commencing with STEP 3 above.

Section 2: Arbitration: Should any such grievance or difference remain unsettled after exhausting the aforementioend procedure, either party hereto, and only either party, shall, if the party desires, demand arbitration by written notice to the other party within five (5) working days after failing to settle the grievance as outlined in paragraph two (2) of STEP 3. The arbitrator shall be appointed by mutual consent of the parties. If the parties are unable to agree upon an arbitrator within seven (7) working days after arbitration is invoked, then either party may request the Federal Mediation and Conciliation Service to provide a list of five (5) qualified arbitrators, and the parties shall select a single arbitrator for such list. The decision of such arbitrator shall be final and binding upon the Company, the Union and its members and emoloyees involved. The arbitrator shall not be empowered to rule contrary to, to amend, or to add to, or to which the parties may have developed under this Agreement. In case

of a discharge or disciplinary layoff grievance, the arbitrator shall have the power to return the grievant to his employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts. Expenses incident to the services of the arbitrator shall be borne equally by the parties herein.

It is further agreed that the above Grievance=Arbitration Procedure shall be and the same hereby is the sole method of settling disputes hereto or between an employee and the Employer and it is further agreed that the Employer, the Union, and the employees covered hereunder shall be bound by any such decisions, determinations, agreements or settlements which may be effectuated pursuant to invoking the Grievance-Arbitration Procedure. If any Employer refuses to arbitrate any grievance, the Union shall have the right to strike.

ARTICLE IX: NO-STRIKE CLAUSE

The Employer and the Union mutually agree that in consideration of the arbitration procedure herein, there shall be no strikes or lockouts for the term of this Agreement.

APPENDIX "H"

ARTICLE XXIII: UNION LIABILITY

It is further mutually agreed that the Union shall within two (2) weeks from the date of execution of this Agreement, serve upon the Employer a written list of the Union's authorized representatives who will deal with the Employer and make a commitment for the Union generally and, in particular, have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and it is further agreed that the Union shall not be liable for any such activities unless authorized. It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized act of its members. It is further agreed that the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above. The Employer in such unauthorized action shall retain its rights to engage in such disciplinary action with reference to such unauthorized acts as its reasonable under all circumstances.